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Commissioner of Internal Revenue v. Lundy: Transforming "An Intended Benefit Into a Handicap"?

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COMMISSIONER OF INTERNAL REVENUE V. LUNDY: TRANSFORMING "AN INTENDED BENEFIT INTO A HANDICAP"?[1]

There is one difference between a tax collector and a taxidermist — the taxidermist leaves the hide.

— Mortimer Caplan, Director of the Bureau of Internal Revenue[2]

I. INTRODUCTION

In 1987, an Ohio taxpayer overpaid his federal income taxes by $17,024, but failed to file a return.[3] Twenty-seven months later, the Commissioner of Internal Revenue sent him a notice of deficiency.[4] Upon receiving the notice, the taxpayer filed his return, then brought suit in the United States Tax Court seeking a redetermination and a refund of his overpaid taxes.[5] Although there was in fact an overpayment, the court lacked power to compel the Internal Revenue Service to pay the refund.[6] To the petitioners dismay, several slight variations in his case would have entitled him to the refund.[7]

This disconcerting scenario has become a regularly argued issue in our nation's courts.[8] Until the Fourth Circuit heard *Lundy v. Internal Revenue Service*,[9] every Circuit presented with the issue affirmed the Tax Court's interpretation of Internal Revenue Code (here inafter I.R.C.) § 6512(b)(2)(B) as limiting its power to award refunds to delinquent taxpayers who received notices of deficiency more than two years after their return was due.[10] The Fourth Circuit held that the Tax Court had power to grant refunds up to three years after the return was due.[11] In *Commissioner of Internal Revenue v. Lundy*,[12] the United States Supreme Court addressed the split in the circuits. In a 7-2 decision, the Court reversed the Fourth Circuit, affirming the Tax Court's interpretation of the statute.[13]

1. Commissioner v. Lundy, 116 S. Ct. 647, 657, (1996) (Stevens, J., dissenting) (claiming the Majority "misse[d] the forest by focusing on the trees," Justice Stevens argues that their single minded reliance on plain meaning arguments caused them to discount compelling evidence of Congress' intent, based on amendments to the statute at issue).

2. DICTIONARY OF QUOTATIONS 681 (compiled by Bergen Evans, Random House 1969) (this candid, yet disconcerting comment appeared in the February 1, 1963 issue of TIME magazine).

3. Allen v. Commissioner, No. 93-1329, 1994 WL 131749, at *1 (6th Cir. Apr. 13, 1994), *aff'g* 99 T.C. 475 (1992). R. Dan Allen's 1987 taxable income was $33,343, and his tax liability for the year was $5,571. *Id.* Mr. Allen sent the IRS $22,595 for the year. *Id.* This amount was the sum of $15,020 of employer withholdings retained from his salary during 1987, and a payment of $7,575 sent on April 15, 1988, with a Request for Automatic Extension of time until August 15, 1988, to file his return. *Id.*

This Note analyzes the Court's decision in *Lundy*. Part II examines the relevant statutory provisions concerning the power granted to the Tax Court and federal district court.[14] Part III addresses the facts, procedural history, and holding of the Court.[15] Part IV(A) analyzes the holding of the case.[16] Part IV(B) addresses several dissenting arguments, and contends that the Court could have clarified this murky area of the law by adopting the holding of *Miller v. United States*.[17]

II. BACKGROUND

Aggrieved taxpayers may sue the IRS in Tax Court, Federal District Court, or the United States Court of Claims.[18] Although each venue generally has power to refund overpaid taxes,[19] the circumstances in which they may do so vary.[20] Taxpayers pursuing such an action should be cognizant of these variations.[21] Powers granted to the District Courts and Court of Claims[22] are delineated in I.R.C. § 6511.[23] Tax Court powers are found in § 6512.[24]

4. Upon determining there was a deficiency of $24,644 in his income tax payment for the year 1987, the IRS sent Allen a notice of deficiency on July 24, 1990. *Id.* Large discrepancies between the amount of the deficiency calculated by the IRS and the actual tax liability are common when notices are sent to nonfilers, since the IRS necessarily bases their calculations solely on the taxpayer's W-2 and 1099 forms, without the benefit of knowing of any deduction they might be entitled to. Arnold J. Gould & Akshay K. Talwar, *Supreme Court Will Clarify Nonfiler Refund Period*, 56 TAX'N FOR ACCT. 76, *available in* Westlaw, 56 TXACCT 76 at 7 (Feb. 1996). Moreover, when the IRS computes the deficiencies of nonfilers, they are not given "credit for withholding taxes and estimated taxes paid. Therefore, even though the withheld taxes and estimated taxes paid exceed the taxpayer's total liability, a deficiency notice is issued." *Id.*

5. Allen filed his Form 1040 for 1987 on October 2, 1990. *Allen*, 1994 WL 131749 at *1. He petitioned the Tax Court on October 22, 1990. *Id.*

6. *Id.* The parties stipulated that the figures used in Allen's returns were correct, and that he had indeed overpaid his taxes by $17,024. *Id.* Writing for the majority, Judge Raum said, "After examining the highly technical statutory provisions limiting the credit or refund of overpayments, we conclude that [Allen] is not entitled to a determination of an overpayment, notwithstanding the fact that he overpaid his 1987 tax." Allen v. Commissioner, 99 T.C. 475, 476 (1992), *aff'd* No. 93-1329, 1994 WL 131749 (6th Cir. Apr. 13, 1994).

7. *See id.* at 479-80. The Tax Court held that the precise wording of the statute that generally enables them to grant refunds, barred the action in this circumstance, since Allen "had not filed a return . . . prior to the mailing of the notice of deficiency. . . ." *Id.* at 480. If Allen had filed his return prior to the mailing of the notice of deficiency, the statute would have permitted the Tax Court to award the refund. *Id; see also infra* Section II(B). Several courts have said in dicta that when taxpayers in this situation file suit in federal district court or Claims Court, they are entitled to recover. *See* Galuska v. Commissioner, 5 F.3d 195, 197 (7th Cir. 1993); Richards v. Commissioner, 37 F.3d 587, 590-91 (10th Cir. 1994). *But see* Miller v. United States, 38 F.3d 473, 476 (9th Cir. 1994) (I.R.C. § 6511(a) is properly interpreted as giving taxpayers "the right to file a claim up to three years after the return *only where* that return is filed within two years of payment of the taxes," effectively eliminating the alleged discrepancy between the venues) (emphasis added).

8. "The Tax Court has had to address the issue in at least 19 cases, and the issue has been presented to at least six courts of appeals." *Supreme Court: High Court Opens New Term with*

Refund claims must go through a two-step process, regardless of where they are filed.[25] The first step is to determine whether the court has power to grant the refund.[26] The second step is to determine the extent of that power.[27]

A. District Court Refund Claim Procedure

1. Step 1 – Power to Grant Refunds.

Pursuant to I.R.C. § 6511(a), claims in district court must meet a filing deadline.[28] However, meeting this deadline only opens the door to the possibility that the court may have the power to compel a refund.[29] The filing deadline delineated in this complex section is met in two situations.[30] First, if the taxpayer has filed a return,[31] it is met if the taxpayer files the claim for refund by the latter of: a) within three years of filing his return; *or* b) within two years of the time the tax was actually paid. Second, if the taxpayer has not filed a return,[32] the claim for refund must be filed within two years of the time the tax was actually paid.

Two Tax Cases on Docket, 1995 DAILY TAX REP. 190 (BNA), 1 (Oct. 2, 1995). The Tax Court only gained the power to order the refunds paid in 1988. Nina J. Crimm, *Tax Controversies: Choice of Forum*, 9 B.U. J. TAX LAW 1, 19 at n.58 (1991) ("TAMRA section 6244(a) amended (I.R.C.) section 6512(b) to give the Tax Court jurisdiction to order refunds of overpayments that it determines. Until the amendment of section 6512(b), the taxpayer had to bring an action in federal district court to enforce the Tax Court's determination.")

9. 45 F.3d 856 (4th Cir. 1995), *rev'g* 63 T.C.M. (RIA) ¶ 93,278 (1993).

10. The other five circuit courts that have heard this issue "held that a refund is time barred in Tax Court if a statutory notice of deficiency was issued more than two years after the date of payment and no return had been filed." Gould & Talwar *supra* note 4, at 76; see Davidson v. Commissioner, 9 F.3d 1538 (2nd Cir. 1993), *aff'g* 62 T.C.M. (RIA) ¶ 92,709 (1992); Allen v. Commissioner, No. 93-1329, 1994 WL 131749 (6th Cir. Apr. 13, 1994), *aff'g* 99 T.C. 475 (1992); Galuska v. Commissioner, 5 F.3d 195 (7th Cir. 1993), *aff'g* 98 T.C. 661 (1992); Rossman v. Commissioner, 46 F.3d 1144, (9th Cir. 1995), *aff'g* 64 T.C.M. (RIA) ¶ 93,351 (Aug. 11, 1993), *cert. denied*, 116 S. Ct. 813 (1996); Richards v. Commissioner, 37 F.3d 587 (10th Cir. 1994), *aff'g* 63 T.C.M. (RIA) ¶ 93,102 (Mar. 24, 1993), *cert. denied*, 116 S. Ct. 813 (1996).

11. *Lundy*, 45 F.3d 856, 868 (1995).

12. 116 S. Ct. 647 (1996), *rev'g* 45 F.3d 856 (4th Cir. 1995), *rev'g* 63 T.C.M. (RIA) ¶ 93,278 (June 28, 1993).

13. 116 S. Ct. at 649.

14. *See infra* notes 18-47 and accompanying text.

15. *See infra* notes 48-67 and accompanying text.

16. *See infra* notes 72-88 and accompanying text.

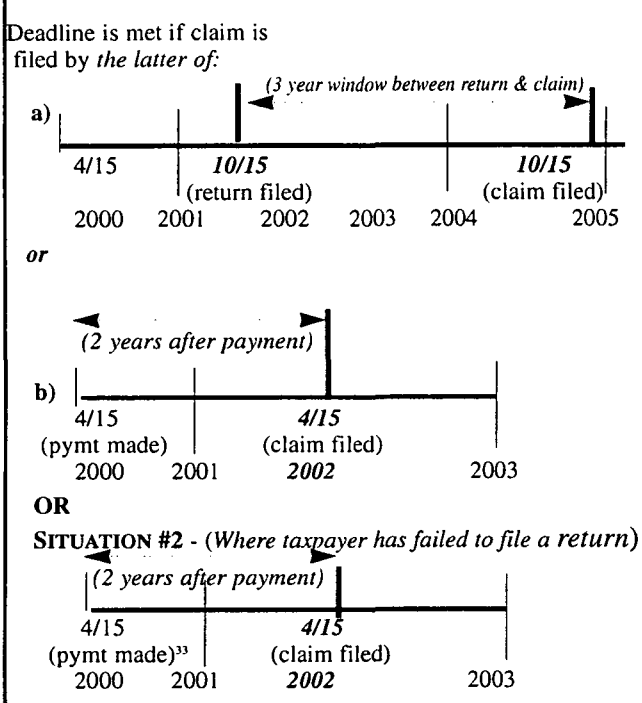
17. 38 F.3d 473 (9th Cir. 1994), *aff'g* 93-1 U.S. Tax Cas. (CCH) ¶ 50,018 (W.D.Wash. Dec. 1, 1992); *see infra* notes 89-113.

18. Marshall W. Taylor et al., *How to Choose the Right Forum in Tax Litigation*, 37 PRAC. LAW. 39, 39-40 (1991). Each venue has different advantages, procedures, and jurisdictions. *See generally id.*

19. "[I]n 1887, Congress enacted the Tucker Act, which . . . permitted taxpayers to file refund suits against the United States government in either the Court of Claims or in federal district court. . . ." Crimm, *supra* note 8, at 62; *see also supra* note 8 (discussing the Tax Court's power to order refunds of overpayment of income taxes).

ILLUSTRATION I.

APPLICATION OF I.R.C. § 6511 FILING DEADLINE FOR TAXABLE YEAR 1999
SITUATION #1 - (*Where taxpayer has filed a return*)



20. *See* (1991) (1991) *infra* (1991) Sections II(A)-(B).

21. The taxpayer should also consider "the burden of proof required of the parties, availability of a jury trial, applicable legal precedent, rules relating to procedure and discovery, persons who can represent the taxpayer and the government, expertise of the judges, service-of-process and subpoena powers, and case backlog." Crimm, *supra* note 8, at 72. The nature of the cause of action, and each court's legal jurisdiction over that type of claim, should not be dispositive on the issue of venue. *Id.* at 71-72. Taxpayers should also understand that if they petition the Tax Court for a redetermination, they are barred from initiating a subsequent suit for that year in any other forum, by operation of I.R.C. § 6512(a), which states in relevant part:

> (a) Effect of Petition to Tax Court. — If the Secretary has mailed to the taxpayer a notice of deficiency . . . and if the taxpayer files a petition with the Tax Court . . . no credit or refund of income tax for the same taxable year . . . shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court except —
>
> (1) As to overpayments determined by a decision of the Tax Court which has become final; and
>
> (2) As to any amount collected in excess of an amount computed in accor-

2. Step 2 – Limits on the Power of the Courts.

Once the filing deadline is met, the second step is to determine the extent of the court's power to act.[34] I.R.C. § 6511(b) establishes look-back periods that limit the court's power to compel refunds to only that money paid in a specified period immediately preceding the filing of the claim.[35] The applicable period will be either two or three years, depending on how the claim met the filing deadline.[36] Section 6511(b)(2)(A) provides for a three year period where the deadline was met using part A of the Situation #1 analysis.[37] Section 6511(b)(2)(B) provides a for two year period where it was met under part B) of the Situation #1, *or* Situation #2 analysis.[38]

B. Tax Court Refund Claim Procedure

1. Step 1 – Power to Grant Refunds.

Procedures for securing refunds of overpayments in Tax Court are more amorphous.[39] Step 1 is effectively met if the claim may statutorily be filed in the court.[40] However, the Commissioner of Internal Revenue must send the Tax Court notice of deficiency before the claim may be filed.[41]

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dance with the decision of the Tax Court which has become final;

and

(3) As to any amount collected after the period of limitation upon the making of levy or beginning a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Tax Court which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive . . . .

I.R.C. § 6512(a) (1996) (emphasis added).

22. For the sake of simplicity, this Note will only refer to the district court when recounting the procedures dictated by this section.

23. "A taxpayer seeking a refund of overpaid taxes ordinarily must file a timely claim for a refund with the Internal Revenue Service . . . under [I.R.C.] § 6511." Commissioner v. Lundy, 116 S. Ct. 647, 650 (1996).

(a) PERIOD OF LIMITATION ON FILING CLAIM. — Claim for credit or refund of an overpayment of [income] tax . . . . shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid . . . .

(b) LIMITATION ON ALLOWANCE OF CREDITS AND REFUNDS. —

(1) FILING OF CLAIM WITHIN PRESCRIBED PERIOD. — No credit or refund shall be allowed or made after the expiration of the period of

2. Step 2 — Limits on Power.

Once it has been determined the Tax Court has the power to grant the refund, the second step is to determine the extent of that power. I.R.C. § 6512(b)(3)(B) incorporates the district court look-back periods[42] by reference, which in turn incorporates their filing deadline.[43] The Tax Court, in effect, must consider how the claim would have been treated in district court.[44] These highly technical statutes have been called "incomprehensible" by a Supreme Court Justice,[45] and as a "trap for the unwary," by a certified public accountant.[46] The primary difficulty with them has been determining exactly how to apply the incorporated district court procedures in the Tax Court analysis. It is generally agreed that the Tax Court is required to apply the district court filing deadline analysis, using a hypothetical claim filed on the date the notice of deficiency was sent.[47] The more difficult question is, whether the Tax Court should consider returns filed subsequent to the mailing of the notice of deficiency.[48]

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limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

(2) Limit on amount of credit or refund. —

(A) Limit Where Claim Filed Within 3-Year Period. — If the claim was filed by the taxpeyer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extention of time for filing the return. If the tax was required to be paid by means of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.

(B) Limit where claim not filed within 3-Year Period. — If the

(C) Limit if no Claim Filed. — If no claim was filed, the credit or refund shall not exceed the amount which would be allowable under subparagraph (A) or (B), as the case may be, if claim was filed on the date the credit or refund is allowed.

I.R.C. § 6511 (1996).

24. I.R.C. § 6512 states:

(b) OVERPAYMENT DETERMINED BY TAX COURT. –
(1) JURISDICTION TO DETERMINE. – Except as provided by paragraph

(3) . . . if the Tax Court . . . finds that taxpayer has made an overpayment of income tax . . . the Tax Court shall have jurisdiction to deter-

III. STATEMENT OF THE CASE

A. Facts

Robert Lundy and his wife (hereinafter Lundy) had an amount of money substantially greater than their tax liability withheld during 1987.[49] Lundy failed to file a return by the due date, April 15, 1988. Nor did he file in the ensuing two and one half years.[50] On September 26, 1990, the CIR sent a notice of deficiency for 1987.[51] The Lundys filed a joint 1987 tax return on December 22, 1990.[52]

B. Procedure

On December 24, 1990, Lundy petitioned the Tax Court seeking a redetermination of the claimed deficiency in his 1987 taxes, and asking for a refund of his overpayment.[53] The Tax Court held, pursuant to I.R.C. §6512(b)(3)(B), that it lacked power to award Lundy a refund.[54] The court reasoned that because Lundy failed to file a return prior to the mailing of the notice of deficiency, and the notice was mailed more than two years after the taxes were paid, their power only extended to sums paid in the two years immediately preceding the mailing of the notice.[55]

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mine the amount of such overpayment . . . .

(3) LIMIT ON AMOUNT OF CREDIT OR

REFUND. — No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid –

(A) after the mailing of the notice of deficiency,

(B) within the period which would be applicable under section 6511 (b)(2) . . . if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment, or

(C) within the period which would be applicable under section 6511 (b)(2) . . .

in respect of any claim for refund filed within the applicable period specified in section 6511 and before the date of the mailing of the notice of deficiency

. . .

I.R.C. § 6512 (1996).

25. "A taxpayer seeking a refund of overpaid taxes ordinarily must file a timely claim for refund . . . under (I.R.C.) § 6511(a). That section contains two separate provisions for deter-

The Fourth Circuit Court of Appeals reversed, holding that I.R.C. § 6512(b)(3)(B) gives the Tax Court a three year look-back period, measured from the date the notice of deficiency was mailed, as in the case at hand.[56] The court opined that the date of a claim for refund is relevant in two ways.[57] First, it is a factor in determining which look-back period applies.[58] Second, it is the date from which the court looks back.[59] The court held that the date of the hypothetical claim dictated by § 6512(b)(3)(B) should only be applied in the second instance.[60] Therefore, as in district court, an actual claim for refund from a taxpayer like Lundy, made subsequent to the mailing of the notice of deficiency, but within three years of the mailing of the return, should give rise to a three year look-back period.[61]

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mining the timeliness of a refund claim. If first establishes a *filing deadline* . . . It also defines two "*look-back" periods* . . . ." *Lundy*, 116 S. Ct. at 650-51 (footnote omitted). Although not expressly stated, the incorporation of I.R.C. § 6511(b)(2) into § 6512(b)(3)(B), forces a simulated district court jurisdiction analysis to occur in the Tax Court jurisdiction analysis. *See id.* at 651-52.

26. *See supra* note 25; *see also infra* Sections II(A)-(B).

27. *Lundy*, 116 S. Ct. at 651. A court's power to compel refunds is limited by a look-back periods. *Id.* The length of this period is determined by comparing the time the refund claim was filed, relative to the time the tax return was filed. *See id. See also infra* Sections II(A)-(B).

28. "Section 6511 has as its purpose foreclosing untimely claims." Miller v. United States, 38 F.3d 473, 475 (9th Cir. 1994); *see also supra* note 23 (although the procedures promulgated by Congress in I.R.C. § 6511(a) are less than clearly written, the title of the section, "*Period of limitation on filing claim*," speaks clearly as to its purpose).

29. This power may be cut off, however, depending on how the second step effects the claim. *See infra* Section II(A)(2); *see also* Treas. Reg. § 301.6511(b)-1(a) (as amended in 1961) ("(a) Effect of filing claim. Unless a claim for credit or refund of an overpayment is filed within the period of limitation prescribed in section 6511(a), no credit or refund shall be allowed or made after the expiration of such period."); JACOB MERTENS, JR., 14 MERTENS L. FED. INCOME TAX'N § 50.68 (Supp. July 1996). ("Section 6511 imposes limitations on both the period for filing a claim for refund and the period for calculating the amount of refund.")

30. *See supra* note 23.

31. Treas. Reg. § 301.6511(a)-1(a)(1), which starts with the words, "If a return is filed . . ." clearly and concisely explains the two situations in which a refund claim made by a taxpayer who has filed a tax return for the year in question, will be deemed to have met the filing deadline. 13 Stand. Fed. Tax Rep. (CCH) ¶ 40,014 at 66,349 (1996); *See also supra* note 23.

32. Treas. Reg. § 301.6511(a)-1(a)(2), which starts with the words, "If no return is filed. . .," explains the circumstances in which a claim for refund of overpayment will meet the filing deadline of I.R.C. § 6511(a), where the taxpayer failed to file a tax return for the year in question. 13 Stand. Fed. Tax Rep. (CCH) at 66,349 [1996].

33. For determining the limitations period, I.R.C. § 6513 has been interpreted as deeming "any tax actually deducted and withheld at the source on wages . . . (as having) been paid on the 15th day of the fourth month following the close of the tax year for which such tax is allowable. . . .") 13 Stand. Fed. Tax Rep. (CCH) ¶ 40,080.01 at 66,420 [1996].

34. The claim must *first* be filed in one of two timely manners described in § 6511(a), then § 6511(b) limits the taxpayers ability to recover the overpayment to the amount paid in the two or three year period immediately preceding the filing of the claim. *See* WEINSTEIN, *supra* note 29, at § 50.68 (supp. July 1996) ("Which refund period applies is dependent upon how the tax

The CIR petitioned the United States Supreme Court for a writ of certiorari.[62] The Court granted certiorari to resolve the conflict between the circuits as to the proper interpretation of this section.[63]

C. Holding

In a 7-2 decision written by Justice O'Connor, the Majority reversed the Fourth Circuit.[64] The Court held that I.R.C. § 6512(b)(3)(B) prevents the Tax Court from refunding taxes paid more than two years prior to the mailing of the notice of deficiency, where the taxpayer has not yet filed his return when the notice is mailed.[65]

Justice Thomas, joined by Justice Stevens, filed a dissenting opinion, claiming the Majority's decision was contary to congressional intent.[66] Justice Stevens also filed a separate dissenting opinion.[67]

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payer satisfied the requirements of Section 6511(a)."); *see also supra* note 27.

35. The opinion in Allen v. Commissioner described this second step as follows:

> Section 6511(b)(2) contains three subparagraphs, each containing what the parties have at times referred to as a "look-back" rule. If subparagraph (A) of section 6511(b)(2) applies, then the credit or refund shall not exceed the amount of tax paid during the period, *immediately preceding* the filing of the claim, equal to 3 years plus the amount of any extension of time for filing the return (hereinafter sometimes referred to as the "3-year look-back period"). If, on the other hand, subparagraph (B) applies, then the refund or credit shall not exceed the amount of tax paid during the 2-year period *immediately preceding* the filing of the claim (hereinafter sometimes referred to as the "2-year look-back period").

99 T.C. 475, 477-78 (1992) (emphasis added).

36. I.R.C. § 6511(b)(2)(A) (1996); I.R.C. § 6511(b)(2)(B) (1996); *see also supra* notes 31-33 and accompanying text.

37. *See supra* note 23. Justice O'Connor, writing for the Majority in *Lundy* summarized the operation of the section stating, "If the claim is filed 'within 3 years from the time the return was filed,' . . . then the taxpayer is entitled to a refund of 'the portion of the tax paid within the 3 years immediately preceding the filing of the claim.'" *Lundy*, 116 S. Ct. at 651.

38. Justice O'Connor went on to explain that if a valid claim for a refund is not filed within three years of the return, "then the taxpayer is entitled to a refund of only that 'portion of the tax paid during the two years immediately preceding the filing of the claim.'" *Id. See also supra* note 23.

39. "Unlike the provisions governing refund suits in (district court), which make timely filing of a refund claim a jurisdictional prerequisite . . . the restrictions governing the Tax Court's authority to award a refund of overpaid taxes incorporate only the look-back period and not the filing deadline from § 6511." *Lundy*, 116 S Ct. at 651.

40. The Tax Court's jurisdiction has been synopsized as follows:

> The Tax Court's authority to decide a dispute – its so-called "jurisdiction" – is limited by statute. Under this limited jurisdiction, the Tax Court can determine whether a deficiency claimed by the IRS is correct. In so determining, it may find and hold that the taxpayer has instead overpaid his tax.

IV. ANALYSIS

The *Lundy* Court resolved the conflict concerning the extent of the Tax Court's power in these circumstances,[68] but missed an opportunity to further clarify a particularly ambiguous and troublesome area of the Code.[69] Utilizing a plain meaning analysis, the Majority consciously avoided addressing the issues underlying the case.[70] Arguments based on legislative intent, the evolution of the statutes, and public policy fell on deaf ears[71] leaving the task of understanding the I.R.C. only slightly less daunting.

> But it can't consider a taxpayer's overpayment (or refund) claim where the tax year isn't properly before the court because it wasn't subjected to the required deficiency notice procedure. . . .

Fed. Tax. Coordinator 2d (RIA) ¶ U-2100, at 52,123-24 (Aug. 8, 1996).

41. *See* Crimm, *supra* note 8, at 4, which states:

The Tax Court's jurisdiction to redetermine asserted deficiencies or liabilities . . . is predicated upon three requisites:

> (1) The Service must determine a deficiency;
>
> (2) The Service must mail a notice of deficiency, or "90-day letter," to the taxpayer. . . ; and
>
> (3) The taxpayer must file a timely petition with the Tax Court for redetermination of the deficiency . . . .

I.R.C. § 6512(a) gives the Tax Court exclusive jurisdiction to determine deficiencies, if upon receiving a notice of deficiency, the taxpayer files a petition prescribed in I.R.C. § 6213(a). *See supra* note 21. That section provides that a petition for redetermination of a deficiency is timely if it is filed "[w]ithin 90 days, or 150 days if the notice is addressed to a person outside of the United States, after the notice of deficiency . . . is mailed . . . ." I.R.C. § 6213(a) (1996); *see* I.R.C. § 7422(e) (1996) ("If the taxpayer files a petition with the Tax Court, the district court or the United States Court of Federal Claims, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund. . . ."); *see also supra* note 8 (relating to the 1988 TAMRA amendment to the I.R.C., giving the Tax Court power to compel refunds of the overpayments they determine).

42. *See supra* Section II(A)(2).

43. *See supra* Section II(A)(1); *see also supra* note 24.

44. "Section 6512(b)(3)(B), which provides the limitations period for Tax Court refund determinations, indicates that the same two-year/three-year periods of Section 6511 apply — except that the periods are measured as if the taxpayer made a claim as of the mailing of the deficiency notice." *Three-Year Refund S/L Applied to Post-Notice Return*, 82 J. TAX'N 304, 305 (1995). "The applicable look-back period is determined by referring to the claim filing deadlines prescribed by Code Sec. 6511(a) . . . .[T]he applicable look-back period is generally determined as though the taxpayer had filed a *hypothetical* refund claim on the date that the IRS mailed its notice of deficiency . . . ." 13 Stand. Fed. Tax Rep. (CCH) ¶ 40,050.025 at

45. Commissioner v. Lundy, 1995 WL 670057 at 4 (U.S. Oral Arg. Nov. 6, 1995).

46. Richards v. Commissioner, 37 F.3d 587, 588 n.3 (10th Cir. 1994). Judge Brorby, writing for the majority, agreed with the certified public accountant / plaintiff's unflattering characterization of the "scheme of limitations on taxpayer refunds" found in the Tax Court statutes. *Id.*

47. *See infra* Section IV(A).

48. Prior to *Lundy*, every circuit court that had ruled on the application of I.R.C. §

A. The Plain Meaning of the Tax Code

The Majority in *Lundy* strictly interpreted the I.R.C. as written, methodically inserting facts from the case into the complex framework presented in § 6512, and painstakingly working through the analysis.[72] Although several steps required inartful leaps between sections, the Court believed this was the only path to the proper result.[73] The Court's analysis began with § 6512(b)(3)(B), which prevents the Tax Court from granting refunds of overpayments unless they were paid, "within the period which would be applicable under section 6511(b)(2) . . . if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment."[74] This section requires the Tax Court to employ district court procedures for determining the applicable look-back period.[75] The language in the parenthetical – "*whether or not filed*" – demands that a hypothetical claim, filed on the date of the mailing of the notice, be used in the analysis.[76] Where the taxpayer has already filed his return for that year, simple look-back period analysis from district court applies.[77] Where the taxpayer has failed to file a tax return, however, the analysis is more difficult.

6512(b)(3)(B) determined that when analyzing the hypothetical claim, *only* the facts *as they stood on the date the notice of deficiency was mailed* should be considered. *See supra* notes 8-11 and accompanying text.

49. A total of $10,131.11 was withheld from the couple's wages. Lundy v. Commissioner, 63 T.C.M. (RIA) ¶ 93,278 at 1391 (1993), *rev'd*, 45 F.3d 856 (4th Cir. 1995), *rev'd*, 116 S.Ct. 647 (1996). $7,797.31 was withheld from Mr. Lundy's wages, and the balance of $2,333.80 was withheld from his wife's. *Id.* The Lundy's actual tax liability for the year was $6,594. Commissioner v. Lundy, 116 S. Ct. 647, 649 (1996).

50. Mr. Lundy made a timely request for an extension to file his 1987 return until August 15, 1988. *Lundy*, 63 T.C.M. (RIA) at 1391. Despite the extension, Mr. Lundy failed to file a return over the next two years. *Id.* On June, 4, 1990, the IRS contacted Lundy and warned him that if he failed to file his return within 30 days, they would prepare a substitute return for him. *Id.* Lundy responded not with a return, but rather with a letter that stated that he had not yet filed his return, but that he would file "within the three year period to claim [his] refund." *Id.* In the early 1980's, after a briefcase containing records relevant to the preparation of his tax return for that year was stolen, Lundy was told by an IRS agent that he had 3 years to file a return and claim a refund. *Id.* Relying on this statement, Lundy filed that return and a number of other year's returns, nearly 3 years late, despite being told by several employees of the IRS on various occasions, that although he had 3 years to file claims for refunds, he should file his return as soon as possible. *Id.*

51. *Lundy*, 116 S. Ct. at 649. The notice of deficiency claimed that Lundy owed the IRS an additional $7,672 in taxes and interest. *Id.* It also stated that he was liable for "substantial penalties," pursuant to I.R.C. §§ 6651(a)(1) and 6653(1), for delinquent filing and negligent underpayment of taxes. *Id.*

52. *Id.* The Lundy's 1987 return stated that they had overpaid their taxes by $3,537, and claimed a refund for that amount. *Id.*

53. *Id.* Because the CIR sent Lundy a notice of deficiency, the Tax Court had jurisdiction to hear the case. *See supra* Section II(B)(1).

54. *Lundy*, 116 S. Ct. at 650. An unbroken line of Tax Court cases interpreted I.R.C. § 6512 (b)(3)(B) this way. *Id.* Recent consistent opinions city by the court included, Allen v. Comm-

Because Lundy had not filed his 1987 return before the CIR sent him the notice of deficiency, one of the two relevant dates for determining the timeliness of the hypothetical claim was missing.[78] There are two broad theories respecting procedure in this situation. The first states that, *all* relevant facts, as they stand on the day the court does its analysis, should be considered.[79] Therefore, if a taxpayer files a return *subsequent* to the mailing of the notice of deficiency, but *prior* to the analysis, the subsequently filed return would be factored into the analysis.[80] The second theory holds that the hypothetical claim should be the *only* claim considered in the analysis.[81]

The *Lundy* Court adopted the second approach to § 6512(b)(3)(B) application.[82] Construing the statute as written, the Majority determined the relevant question the Tax Court must ask is, whether a "claim filed '*on* the date of the mailing of the notice of deficiency'– *would be* filed 'within 3 years from the time the return *was* filed.'"[83] Consequently, where *no* return has been filed at the time a notice of deficiency is mailed, the hypothetical refund claim can not be filed within three years of the time the return *was* filed.[84] This is true because, *on* that date, since no return existed, there is no date from which to measure the period.[85] The absence of this essential date necessitates the conclusion that the § 6511(b)(2)(B) default two year look-back period applies.[86]

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issioner, 99 T.C. 475 (1992); Galuska v. Commissioner, 98 T.C. 661 (1992); and Berry v. Commissioner, 97 T.C. 339 (1991). *Id.*

55. *Lundy*, 116 S.Ct. at 650.

56. Lundy v. Internal Revenue Serv., 45 F.3d 856, 868 (4th Cir. 1995), *rev'd*, 116 S. Ct. 647 (1996).

57. *Id.* at 861.

58. *Id.*

59. *Id.*

60. *Id.* Circuit Judge Russell said § 6512(b)(3)(b) should be interpreted as:

> merely shifting back the benchmark date of the refund period from the date on which the taxpayer filed the claim for refund to the date on which the IRS mailed the notice of deficiency; *§ 6512(b)(3)(B) does not change the length of the refund period from what would have applied under § 6511(b)(2).*

Id. (emphasis added) .

61. *Id.* at 862. "In our view, § 6512(b)(3)(B) never mandates a two-year refund period in the Tax Court where a United States district court or the United States Claims Court would have applied the three-year period under § 6511(b)(2)." *Id.* Breaking with every other circuit court that has ruled on the issue, and contrary to the plain meaning of the statute, the Fourth Circuit crafted an intricate legislative intent argument, claiming § 6512(b)(3)(B) was intended to be a benefit to taxpayers who chose to file in Tax Court. *See id.* at 862-68; *see also supra* note 10.

62. *See* Commissioner v. Lundy, 116 S.Ct. 647, 650 (1996).

63. Commissioner v. Lundy 115 S. Ct. 2244 (1995).

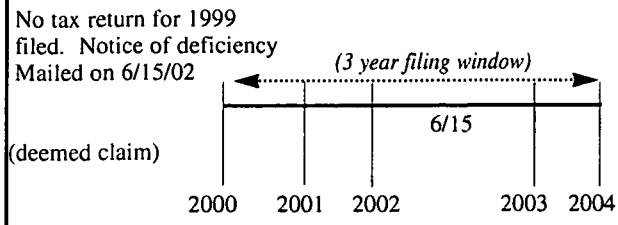
64. *Lundy*, 116 S. Ct. at 650.

65. *Id.* at 652.

66. *See id.* at 657-62; *see also infra* Section IV(B)(1).

ILLUSTRATION II.

APPLICATION OF I.R.C. § 6512(B)(3)(B) ON THE DATE OF THE MAILING OF THE NOTICE OF DEFICIENCY, WHERE NO RETURN IS FILED PRIOR TO THE MAILING OF SUCH NOTICE



NOTE - Because no return exists, it is impossible for the claim to have been filed within three years of it on that specific date. The requirements of § 6511(b)(2)(A) not being met, the default position of § 6511(b)(2)(B) applies.

67. *Id.* at 657 (Stevens, J., dissenting). Justice Stevens claims that the section's intended purpose is easily discerned through examination of the changes made to its predecessor. *Id.* He said Congress "expressly intended to guard against the possibility that the time for claiming a refund might lapse before the taxpayer in these circumstances realizes that he is entitled to a refund." *Id.* Echoing Justice Thomas' attack on the Majority's insistence on interpreting the statute through the 'plain meaning' technique, he said:

> there is no need to read Section 6512(b)(3)(B) – a provision designed to benefit the taxpayer who receives an unexpected deficiency notice – as giving the IRS an arbitrary right to shorten the taxpayer's period for claiming a refund if that taxpayer has not yet filed a return. The Court's reading of the statute converts an intended benefit into a handicap.

Id. (Stevens, J., dissenting).

68. *Id.* at 650 (O'Conner, J., for the majority).

69. The Court decided this case using plain meaning analysis, despite the CIR's reference to Miller v. United States, 38 F.3d 473 (9th Cir. 1994). *Id.* at 656. Had the Court adopted the reasoning used in *Miller*, the arguments posited by Lundy, and the Minority would have been rendered irrelevant. *See supra* Section IV(B)(3).

70. After acknowledging Lundy's argument that interpreting I.R.C. § 6512(b)(3)(B) as dictating a two-year look-back period in these circumstances would create "a disparity between the limitations period(s)" applicable in Tax Court and district court, the Majority maintained that the Court was bound by the words Congress actually approved. *Lundy*, 116 S. Ct. at 656. "We assume without deciding that Lundy is correct, and that a different limitations period would apply in district court, but nonetheless find in this disparity no excuse to change the liitations scheme that Congress has crafted." *Id.*

71. "We are bound by the language of the statute as it is written, and even if the rule Lundy advocates might 'accor[d] with good policy,' we are not at liberty 'to rewrite [the] statute because [we] might deem its effects susceptible of improvement.'" *Lundy*, 116 S. Ct. at 656-57 (alteration in original) (quoting Badaracco v. Commissioner, 464 U.S. 386, 398 (1984)).

72. *See id.* at 651-52.

B. Disparate Treatment of Similar Claims in Different Venues?

A common complaint in cases with fact patterns like *Lundy* is, if § 6512(b)(2)(B) requires the use of the default two year look-back period, the taxpayer would be treated differently if he had filed in district court.[89] Proponents of this view claim Congress could not have intended such a disparate outcome.[90]

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73. *Id.* at 651. Writing for the majority, Justice O'Connor implied that although Congress may have failed miserably in creating a code that is pleasant to read, like an instruction manual, if it is followed methodically, individuals of average intelligence will find its procedures are not overly complex. *Id.* "The analysis dictated by § 6512(b)(3)(B) is not elegant, but it is straightforward." *Id.* The Court is increasingly relying on the plain meaning method of statutory interpretation. *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992). "[J]ustices of the Supreme Court are attempting with missionary zeal to narrow the focus of consideration to the statutory text and its 'plain meaning,'" *Id.* at 921-22.

74. *Lundy*, 116 S. Ct. at 651 (quoting I.R.C. § 6512(b)(3)(B) (1996) (emphasis added)).

75. "Section 6512(b)(3)(B) defines the look-back period that applies in Tax Court by incorporating the look-back provisions from § 6511(b)(2) . . . ." *Id.* at 651-52.

76. *See supra* Section II(B)(2); *see* also A. Breault et al., *Two-Year Refund Statute Applies to Nonfilers*, 21 TAX'N FOR LAW. 254, 254 (1993) ("Generally, under Section 6512(b)(3)(B), a taxpayer's refund claim is deemed filed on the date a deficiency notice is issued if no other claim has yet been filed."). Where the CIR sends a notice of deficiency *before* the taxpayer files a return for that year, a hypothetical claim filed on the date of the mailing of the notice shall be used. I.R.C. § 6512(b)(3)(A) (1996). However, where the taxpayer has filed a claim before the CIR sends the notice of deficiency, the date that the actual claim was filed may be used in the analysis. I.R.C. § 6512(b)(3)(C) (1996).

77. *See supra* Section II(A)(2). If the notice of deficiency was mailed within three years of the time the return was filed, the three year look-back period applies. *Id.* However, if the difference between the dates is more than three years, the default two year look-back period of § 6511(b)(2)(B) applies. *Id.* Justice Thomas claimed that the IRS's construal of § 6511(a) in Revenue Ruling 76-511 dictates a limitations period the corresponds with the period for assessment. *Lundy*, 116 S. Ct. at 658 (Thomas, J. dissenting). He explained that "the taxpayer has three years from the time he files his return to file a claim, and the Government usually has three years from the time the taxpayer files a return, for assessment." *Id.*

78. *See id.* at 652.

79. Justice Thomas, in his dissent, posited a plain meaning argument of his own in support of the first theory of interpretation. *Id.* at 659 (Thomas, J., dissenting). He claimed that the section does not, as the Majority contends,

> require the Tax Court to limit its consideration to events that occurred on or before the notice of deficiency was mailed. Indeed, if anything, the variance in tenses ("would be applicable . . . if a claim had been filed") suggests that the Tax Court should determine the proper look-back period in the same way that courts normally determine the applicability of statutes of limitation – with whatever information it has at the time that it rules.

Id.

80. "The statute incorporates the look-back periods of § 6511 and then explicitly tells the Tax Court that, in applying § 6511, it should pretend that an event happened 'whether or not' it actually did happen; it does not tell the Tax Court to *ignore events that did happen.*" *Id.* (Thomas, J., dissenting) (emphasis added, footnotes omitted).

1. Recognition of Post-Notice Filings

In his dissent, Justice Thomas argues that the disparate treatment of similarly situated taxpayers resulting from the Majority's interpretation of the statute is permissible, but nonetheless improper.[91] Had Congress intended such divergent treatment, he contends, it would have written the statue more clearly. [92] Justice Thomas notes it is generally accepted that returns filed subsequent to the mailing of the notice of deficiency are considered in the look-back analysis for taxpayers who file suit in district court.[93]

Further, he contends that the Congressional record does not indicate an intent on the part of the legislature to treat taxpayers who file in Tax Court differently.[94] Absent evidence of such intent, he argues that the poorly drafted statute should be construed as providing a uniform look-back period in both fora.[95]

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81. *Id.* at 651. The Tax Court adopted a slight variation of this theory when they heard Lundy's case. Lundy v. Commissioner, 63 T.C.M. (RIA) ¶ 93,278 at 1393 (1993). They held that a 'snapshot' should be taken of the relevant facts as they stood on the day the notice was mailed, and *only* those facts should be considered. *Id.*

82. *Lundy*, 116 S. Ct. at 651.

83. *Id.* at 652 (emphasis added).

84. *Id.* Justice O'Connor asserted that "the claim contemplated in § 6512(b)(3)(B) would not be filed within the 3-year window described in § 6511(a), and the 3-year look-back period set out in § 6511(b)(2)(A) would not apply." *Id.*

85. *Id.*

86. "The applicable look-back period is instead the default 2-year period described in § 6511(b)(2)(B), which is measured from the date of the mailing of the notice of deficiency . . . ." *Id.* For the purpose of clarity, this note, like the *Lundy* Court, refers to the two year look-back period prescribed by § 6511(b)(2)(B) as a *default* period. The title of the subparagraph, *Limit Where Claim Not Filed Within 3-year Period*, is also clearly indicative of the back-up nature of the provision. I.R.C. § 6511(b)(2)(B) (1996).

87. *Lundy*, 116 S. Ct. at 653.

88. In defense of this seemingly unfair result, Justice O'Connor explained that § 6512(b)(3)(B) treats delinquent taxpayers "less charitably" than timely filers. *Id.* Where "timely filers are virtually assured" recovery, the fate of a delinquent filer's claim is entirely dependent on the timing of the mailing of the notice of deficiency. *Id.; see also supra* Section II(B)(2). Applying the Court's plain meaning interpretation of § 6512 to Lundy's case, Justice O'Connor stated:

> Lundy's taxes were withheld from his wages, so they are deemed paid on the date his 1987 tax return was due (April 15, 1988), see [I.R.C.] § 6513(b)(1), which is more than two years prior to the date the notice of deficiency was mailed (September 26, 1990). Lundy is therefore seeking a refund of taxes paid outside the applicable look-back period, and the Tax Court lacks jurisdiction to award such a refund.

Lundy, 116 S. Ct. at 653.

89. *See* Richards v. Commissioner, 37 F.3d 587 (10th Cir. 1994), *cert. denied*, 116 S.Ct. 813; Galuska v. Commissioner, 5 F.3d 195 (7th Cir. 1993); Rossman v. Commissioner, 64 T.C.M. (RIA) ¶ 93,351 (1993).

2. Unilateral Discretion of the IRS to Shorten Taxpayer Look-Back Periods.

Opponents of the Majority's interpretation of § 6512(b)(3) argue it improperly gives the IRS unilateral power to shorten the time taxpayers have to claim refunds.[96] Under the interpretation, delinquent taxpayers are treated equally in all venues where the notice of deficiency is sent within two years of the due date. If they litigate in district court, they have sufficient time to file their return and secure a refund.[97] Similarly, if they file suit in Tax Court, although the default two year look-back period applies, they are able to recover.[98]

Where the CIR sends the notice of deficiency between the second and third years, however, a discrepancy arises. In District Court, delinquent taxpayers again have sufficient time to file their returns, making them eligible for the three year look-back period and a refund.[99] In Tax Court, however, the default two year position applies again, effectively preventing recovery of the overpayment.[100]

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90. *See infra* Sections III(B)(1)-(2).

91. *Lundy*, 116 S. Ct. at 661 (Thomas, J., dissenting). In contrast to the reasoning used by the majority in the Fourth Circuit decision, Justice Thomas rejected Lundy's argument that it would be irrational for Congress to set up a procedure by which the IRS could unilaterally shorten the time a taxpayer has to file a claim for a refund of overpaid taxes. *Id.*; *see also infra* note 95 and accompanying text. Justice Thomas asserted, however, it would be irrational to implement such a scheme in the Tax Court alone. *Lundy*, 116 S. Ct. at 661. Doing so would only work to punish those taxpayers who are financially unable to file in district court or too unsophisticated to realize the benefit of doing so. *Id.* He contented that Congress could not have intended to have adopted § 6511 into § 6512 dictates uniform treatment of taxpayers in either venue. *Id.* at 657-62.

92. Id. at 660-61. Justice Thomas convincingly argued against the use of plain meaning analysis, stating:

> If Congress had intended the Commissioner's construction of § 6512(b)(3)(B), there would have been no reason to refer to § 6511; instead, it could have stated the look-back periods much more simply and clearly, e.g., by specifying that a 3-year look-back period should apply if the taxpayer filed a return before the notice of deficiency was mailed, and that otherwise a 2-year look-back period should apply.

Id. (Thomas, J., dissenting).

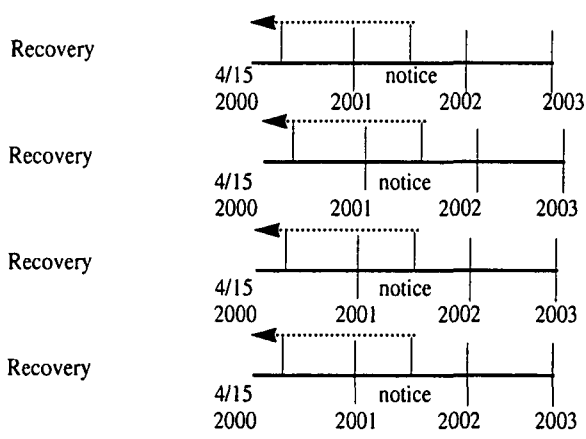
93. *Id.* at 657. "Under the Internal Revenue Service's longstanding interpretation of (I.R.C.) §§ 6511(a) and (b), Lundy would have collected a refund if he had filed suit in district court. The majority assumes, and I am prepared to hold, that that interpretation is correct." *Id.* (Thomas, J., dissenting). Justice Thomas contends that the incorporation of the district court procedures of § 6511 into § 6512 dictates uniform treatment of taxpayers in either venue. *Id.* at 657-62.

94. *See generally id.* at 657 ("[N]othing in § 6512(b)(3)(B) suggests that Congress intended to shorten the look-back period in a proceeding in Tax Court . . . .") (Thomas, J., dissenting). such a procedure. *Id.*

95. *Id.* at 658. Justice Thomas argued that "in light of the language of § 6511(a), the absence of any reason to think that Congress affirmatively intended to prevent taxpayers who file their

ILLUSTRATION III.

ABILITY OF A DELINQUENT TAXPAYER TO SECURE A REFUND OF OVERPAYMENTS FOR TAXABLE YEAR 1999 IN TAX COURT AND DISTRICT COURT, WHERE NOTICE OF DEFICIENCY IS SENT BETWEEN 0-2 YEARS AND 2-3 YEARS AFTER DUE DATE



District Court
Subsequent return and claim filed
3 year look-back

Tax Court
Circumstances as on date of notice of deficiency
2 year look-back

District Court
Subsequent return and claim filed
3 year look-back

Tax Court
Circumstances as on date of notice of deficiency
2 year look-back

returns more than two years late (but less than three years late) from collecting refunds, and the Service's 20-year interpretation of § 6511," § 6512(b)(2)(B) is only fairly read as giving taxpayers in Lundy's circumstances the same three year look-back period they would have received had they filed suit in district court. *Id.* (Thomas, J., dissenting).

96. Taxpayers generally have three years to file returns and make claims for overpayments. *See supra* note 77. Judge Russell, writing for the Fourth Circuit in Lundy's case, claimed their interpretation of § 6512(b)(3)(B) eliminated the disparate treatment a delinquent taxpayer would receive, depending on where he filed. Lundy v. Internal Revenue Serv., 45 F.3d 856, 864 (4th Cir, 1995). The court held that tax returns filed *subsequent* to the mailing of the notice of deficiency should be considered, eliminating the 23IRS's ability to effectively shorten the time period in which a taxpayer who chooses to file in Tax Court may claim a refund. *Id.* Judge Russell stated that he was unable to conceive of any "rational reason" for permitting a taxpayer's three-year refund period to be "cut short to two years simply because the IRS beat (them) to the punch by mailing the notice of deficiency first." *Id.* ("Congress certainly did not intend the length of the refund period to turn on such an arbitrary distinction."). *But see* Rossman v. Commissioner, 64 T.C.M. (RIA) ¶ 93,351 at 1785 (1993) (generally discounting the argument that disparate treatment of similarly situated taxpayers who chose to litigate in different forums is per se unreasonable). "[T]he fact that a potential disparity exists between forums is not a sufficient reason to depart from the plain meaning of the statutory language." *Id.* at 1789.

97. *See infra* Illustration III.

98. *Id.*

99. *Id.*

100. *Id.* I.R.C. § 6513 dictates that withholdings are deemed paid on the due date of the taxable year for purposes of determining the limitations period. *See supra* note 31. Consequently, the date the withholdings are deemed to have been paid, falls outside of the applicable two year look-back period, effectively denying power to the Tax Court to compel the refund.

101. Miller v. United States, 38 F.3d 473 (9th Cir. 1994), *aff'g* 93-1 U.S. Tax Cas. (CCH) ¶

3. *Miller v. United States* - The Ninth Circuit Preventative Solution.

The *Lundy* Court declined to adopt the reasoning of *Miller v. United States*,[101] a Ninth Circuit case that used plain meaning arguments to interpret I.R.C. § 6511(b)(2).[102] Had the Court adopted the *Miller's* reasoning, the two arguments made by the dissent would have been nullified.[103]

The *Miller* court held that the ultimate purpose of the statute is to "foreclose on untimely claims."[104] The Majority held that reading § 6511(a) as saying the clock could only "start running when a return was filed," would give rise to a situation in which "no claim would ever be barred, as long as the return had not been filed."[105] This reading also renders useless the second clause, which gives an alternative measuring time for cases where no return had been filed.[106] The *Miller* court held the statute should be read as requiring taxpayers to file their returns within two years of the due date in order to get the three year look-back period.[107] Failure to do so makes the default two year look-back period applicable.[108]

50,018 at 87,071(W.D.Wash. Dec. 1, 1992).

102. *See* Commissioner v. Lundy, 116 S.Ct. 647, 656 (1996).

103. *See infra* notes 109-12 and accompanying text.

104. *Miller*, 38 F.3d at 475.

105. *Id.*

106. *Id.* at 475-76. "To hold that any return, no matter how delinquent, starts the three-year period would not only nullify part of § 6511, but also reward taxpayers for delaying the filing of their returns." *Id.* at 475-76.

107. *Id.* "We decline to impose upon the Internal Revenue Code any interpretation that would render any of its clauses irrelevant or have an effect so manifestly opposite that intended by the statute." *Id. But see* Domtar Newsprint Sales Ltd. v. United States, 435 F.2d 563, 564-67 (Ct. Cl. 1970); Blatt v. United States, 830 F.Supp. 882, 885 (W.D.N.C. 1993) (holding that, because a tax return can effectively constitute a claim for refund, the filing deadline of § 6511(a) can be met years after the due date for the tax return), (4th Cir. 1994) *aff'd* 34 F.3d 252.

108. *See* Miller, 38 F.3d at 475-76.

109. For determining the limitations period, I.R.C. § 6513 has been interpreted as deeming "any tax actually deducted and with held at the source on wages . . . (as having) been paid on the 15th day of the fourth month following the close of the tax year for which such tax is allowable. . . .") 13 Stand. Fed. Tax Rep. (CCH) ¶ 40,080.01 at 66,420 (1996).

110. Judge Wiggins, writing for the Majority in *Miller*, explained how their common sense textural approach to interpreting I.R.C. § 6511(a) eliminated the disparate treatment of delinquent taxpayers. *Miller*, 38 F.3d at 475-76. He wrote:

> Giving effect to the portion of § 6511(a) that only allows two years for filing a claim where no return is filed is also necessary to prevent a disparity in the adjudication of tax claims. Taxpayers would have been barred from recovering any taxes paid if they had petitioned the Tax Court rather than bringing an action in the district court.

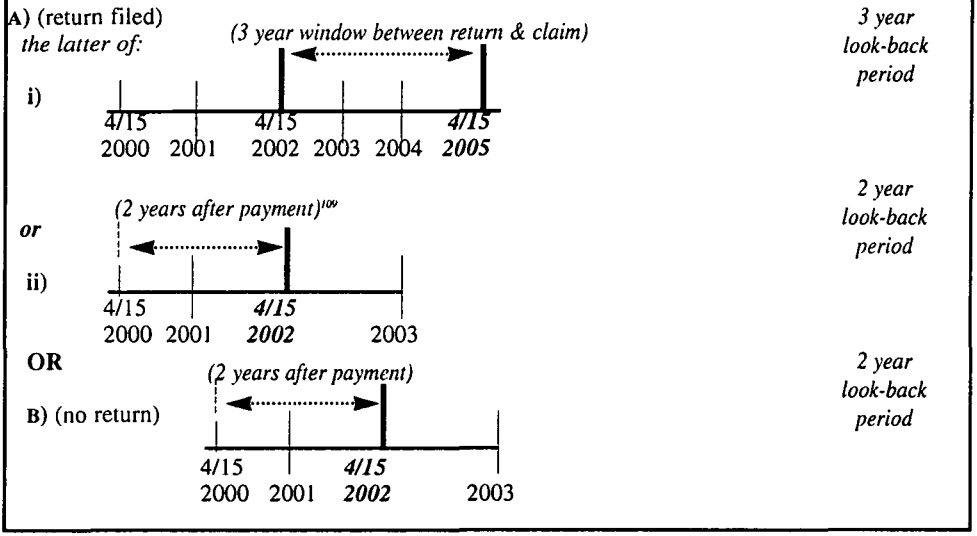
Id.

111. *See supra* Illustration III.

112. *See supra* Illustration IV part B. (after two years, delinquent taxpayers who receive a

ILLUSTRATION IV.

APPLICATION OF THE *MILLER* INTERPRETATION OF I.R.C. § 6511
FOR A REFUND CLAIM
MADE FOR THE TAXABLE YEAR 1999.



Adopting the *Miller* interpretation of § 6511(a) eliminates the discrepancy complained of in the subsequent filing arguments.[110] Because subsequent filings are not recognized in Tax Court, where a notice of deficiency is sent to a

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notice of deficiency are effectively forced into § 6511(b)(2)(B) look-back status).

113. *See supra* notes 110-11.

114. One commentator described the taxpayer's dilemma in interpreting the nations tax laws as follows:

> The Tax Court ignores certain circuit court decisions. The Internal Revenue Service ignores certain Tax Court decisions as well as circuit court, Claims Court, and district court decisions. The taxpayer is left searching for any port in a storm. The particular port is not so important; the taxpayer simply would like to know for certain that a port exists and what its location is. Such certainty is denied him. Understandably, the taxpayer is becoming disillusioned with those responsible for the unnavigable waters.

Deborah A. Geier, *The Emasculated Role of Judicial Precedent in the Tax Court and Internal Revenue Service*, 39 OKLA. L. REV. 427, 455 (1986).

115. *See supra* note 2, and accompanying text. Considering the increase of cynicism in the country over the past three decades, this statement undoubtedly rings more true today than when it was made.

116. Dissatisfaction with the I.R.C. is evidenced by the resonance of the talk about reform. Since the Republican takeover of Congress in 1994, the body responsible for the unbridled growth of the Code in years past, now talk of the need for drastic reform. Former New York Representative, Chairman of the Kemp Commission on Tax Reform, and 1996 Republican

delinquent taxpayer between two and three years after the due date, a two year look-back period applies, and recovery is barred.[111] Under *Miller*, similarly situated taxpayers who file in district court are likewise effectively limited to a two year look-back period, and no recovery.[112]

Similarly, the adoption of the *Miller* holding eliminates the problem of the CIR effectively shortening the look-back period for delinquent taxpayers. This is because, regardless of where a delinquent taxpayer who receives a notice of deficiency between two and three years after the due date chooses to initiate suit, their claim is effectively restricted to a two year look-back period.[113] The inequity is eliminated, because the treatment is uniform.

V. CONCLUSION

The Supreme Court's decision in *Lundy* remedies the Circuit Court split concerning the appropriate length of the look-back period applicable in Tax Court, where the delinquent taxpayer receives a notice of deficiency more than two, but less than three years after their return is due. Relying on plain meaning analysis, and choosing not to adopt the reasoning of *Miller*, short of denying *certiorari*, the Court did the least they could in clarifying the general area of refunds. The holding predictably affirmed the interpretation used in the majority of courts that have heard the issue. Hence, this dispositive statement on the operation of § 6512 only adds a small measure of clarity to the statutory puzzle known as the Internal Revenue Code.[114]

An increasing number of citizens agree with the thirty three-year-old taxidermist/tax collector analogy ity taxpayers receive from this ruling is more than likely posited by the former Director of the Bureau of Interan Revenue.[115] The inability of these individuals to understand the tax code fuels their anger.[116] The benefit of clarentirely neutralized by the seemingly unfair interpretation of the sections operation. However, it is important to remember that taxpayers in these situations suffer an injury of their own making.[117]

Vice Presidential candidate, Jack Kemp, argued in testimony before Congress, "[W]e should repeal the whole code. We should pull up the whole code. It can't be saved. It is impossibly flawed. It is corrupting. It breeds cynicism. It is counterintuitive. It is counterproductive. . . ." Remarks at a Republican conference on the topic of tax reform in the Dirksen building in Washington D.C. (July, 23, 1996), *Availiable in* 1996 WL 5794684 at *25.

117. "[W]hile the result . . . may seem harsh, it is 'mandated by law' and is 'a problem of the taxpayer's own creation.'" Allen v. Commissioner, 1994 WL 131749, at *4 (6th Cir. Apr. 13, 1994) (quoting Berry v. Commissioner, 97 T.C. 339, 345 (1991)).

118. Commissioner v. Lundy, 116 S.Ct. 647, 657 (1996) (Stevens, J., dissenting).

Charges of inequity in these situations could have been easily eliminated, without abandoning textural analysis, if the Court had adopted the *Miller* reasoning, which likewise was decided with plain meaning arguments. Doing so would have undermined the claim that their common sense interpretation transformed "an intended benefit into a handicap."[118] Arguably, the Court's failure to utilize this reasoning was more injurious to taxpayers.

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